

No. 84-225

Office-Supreme Court, U.S.  
FILED

SEP 28 1984

ALEXANDER L. STEVAS,  
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IN THE  
**Supreme Court of the United States**  
October Term, 1984

RICHARD MALIZIA,

*Petitioner,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

**BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI**

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### **Counter-Statement/Questions Presented**

1. Is there an adequate and independent state ground precluding review in this Court when the New York Court of Appeals holds that a state criminal defendant is not entitled to review of an alleged, but completely unobjected-to, evidentiary error at a re-trial even though there was an unsuccessful objection at the first trial before a different judge?

2. Is the Confrontation Clause violated when, to prove that the petitioner met with another person who was subsequently murdered, the prosecutor introduces that other person's reliable, albeit hearsay, statement made shortly before the meeting that he was going out to meet with the petitioner?



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**BRIEF IN OPPOSITION TO PETITION  
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**Preliminary Statement**

On February 11, 1981, petitioner Richard Malizia was convicted in the Supreme Court, New York County (Norman B. Fitzer, J.), after a jury trial, of Intentional Murder [New York Penal Law §125.25(1)], Felony Murder [Penal Law §125.25(3)], Attempted Murder in the Second Degree (Penal Law §§110.00 and 125.25), and Assault in the First Degree (Penal Law §120.10).

Petitioner was sentenced to concurrent prison terms of from 25 years to life imprisonment on the two murder counts. He also received concurrent terms of from 8½ to

25 years on the attempted murder count and from 5 to 15 years on the assault count, to run consecutive to the murder counts. Petitioner is now serving this sentence.

By an order dated March 8, 1983, the Appellate Division, First Department, of the New York Supreme Court unanimously affirmed the judgment of conviction. *People v. Malizia*, 92 A.D.2d 154. In a memorandum dated May 10, 1984, the New York Court of Appeals unanimously affirmed the order of the Appellate Division. *People v. Malizia*, 62 N.Y.2d 755.

Petitioner now seeks a writ of certiorari to review the judgment of the Court of Appeals.

### Statement of the Case

During the early morning hours of December 19, 1978, Jimmy Terrell, a major drug dealer to Harlem, was shot to death, execution-style, only moments after he entered the car in which petitioner and at least one companion were seated. Within seconds of the shooting, petitioner's car drove down the street toward the parked car of Harry Terrell, Jimmy's brother and underling in narcotics trafficking. As petitioner's car came abreast of Harry's car, petitioner aimed a gun at Harry and fired a burst of shots at him. None of Harry's wounds was fatal because he had just enough time to scramble for cover.

A few hours later, Jimmy Terrell's bullet-riddled body was found alongside a nearby portion of the New York State Thruway. The next day, Harry Terrell identified petitioner to the police. Petitioner was arrested on January 8, 1979.

Petitioner's first jury trial before Justice Aloysius Melia ended in a mistrial on February 22, 1980, when the jury was unable to reach a verdict. The re-trial before Justice Fitzer began on October 2, 1980. On October 9th the jury found petitioner guilty on all of the charges.

At the second trial, as at the first one, the key prosecution witness was Harry Terrell, whose eyewitness account included an in-court identification of petitioner. Although Harry had seen petitioner briefly during the shooting, he recognized petitioner immediately because they were well-acquainted. A substantial body of evidence convincingly corroborated Harry's testimony.

### **The Disputed Testimony**

Harry Terrell also related at trial a series of conversations he had with his brother on December 18th concerning Jimmy Terrell's intended meeting that evening with petitioner. Jimmy instructed Harry to drive him to the rendezvous, indicating that the time of the meeting was midnight and the place was the area of 206th Street near the Pathmark store. Jimmy explained further that the purpose of the meeting was twofold: to purchase narcotics from petitioner on behalf of a man named Ernest Green and to repay petitioner for a prior narcotics transaction.

Just before the beginning of petitioner's first trial, the prosecutor offered these statements by Jimmy Terrell under the hearsay exception for declarations of future intent. After petitioner's counsel objected to the admission of the statements on that ground, the judge ruled that they were

admissible. At the re-trial before a new judge, counsel did not register any objection to the statements either before or during the course of the trial.

### **The Intermediate Appeal**

Following his re-trial and conviction, petitioner appealed to the Appellate Division, First Department. That court unanimously affirmed the judgment of conviction in a written decision dated March 8, 1983. Reaching the merits of the hearsay claim, the court held that the statements were properly admitted because, under all the circumstances, the expressed intent to meet petitioner was a serious one, and it was likely that such a meeting would take place. 92 A.D. 2d at 160-61, *supra*. The court went on to find that even if the statements had been admitted erroneously, the error was a harmless one in light of the other evidence indicating that the meeting had taken place, as planned. *Id.* at 162.

### **The Judgment Below**

In a memorandum dated May 10, 1984, the New York Court of Appeals unanimously affirmed the order of the Appellate Division. The court held *inter alia* that petitioner's hearsay claim was not preserved for appellate review because defense counsel had not objected at or before trial. The court also noted that counsel's objection at the first trial had no effect at the second trial because evidentiary rulings made at a trial are not binding at the re-trial. 62 N.Y.2d at 757-58, *supra*.

## Reasons for Denying the Writ

1. The New York Court of Appeals held in this case that petitioner's claim concerning the admissibility of certain hearsay statements was not preserved for appellate review because petitioner's trial counsel had failed to register a timely protest.\* *People v. Malizia*, 62 N.Y.2d 755 (1984), reprinted in Petitioner's Appendix at pp. 1-4.

Petitioner's failure to comply with the state contemporaneous objection rule, therefore, constitutes an independent and adequate state ground which bars review of the instant claim. *Michigan v. Tyler*, 436 U.S. 499, 512, n.7 (1968). Of course, that rule (New York Criminal Procedure Law Section 470.05) serves a legitimate state interest because it permits a trial judge to cure alleged defects, thereby avoiding a subsequent reversal and new trial. *See Henry v. Mississippi*, 379 U.S. 443, 448-49 (1965).

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\* Petitioner is seeking a writ of certiorari to the New York Court of Appeals from that court's May 10, 1984, judgment. In a footnote at pp. 46-47, petitioner makes the novel suggestion that the holding of non-preservation by the Court of Appeals somehow amounts to a lack of jurisdiction by that Court, thereby requiring that the writ of certiorari be granted to review the decision by the Appellate Division, First Department. Surely this argument is entitled to short shift: whether or not the Court of Appeals had power to review the alleged evidentiary error, the Court clearly had jurisdiction to hear, decide, and render a judgment on the appeal. *See* New York Criminal Procedure Law Sections 450.90 and 460.20.

The jurisdictional statute permitting this Court to review state court cases (28 U.S.C. §1257) does not require that a decision be rendered on the merits by the state court of last resort. Rather, there must only be a judgment by that court. *See* Stern & Gressman, *Supreme Court Practice*, §3.20, pp. 201-02 (5th ed. 1976). In this case, such a judgment was rendered, notwithstanding the fact that the hearsay issue was not preserved.

In a futile attempt to overcome this procedural barrier, petitioner points out that his trial counsel had objected to the evidence in question at the first trial, which resulted in a mistrial when the jury was unable to reach a verdict. Petition at 43-44. According to petitioner, the ruling at the first trial allowing the evidence to be introduced was a "binding" one which survived the mistrial, and relieved counsel of the responsibility to renew his objection at the re-trial before a different judge.\*

Whether an evidentiary ruling survives a mistrial, however, is a question of state law which the New York Court of Appeals has resolved against petitioner. *People v. Malizia*, 62 N.Y.2d 757-58, *supra*. Notably, New York followed the general rule in finding that an evidentiary ruling has no binding effect at a re-trial. See *United States v. Akers*, 702 F.2d 1145, 1148 (D.C. Cir. 1983) (cases cited). There is no reason for this Court to review the New York Court of Appeals' unequivocal decision regarding its own law on a procedural matter.

2. Even assuming that the procedural default in state court did not occur, this case still presents no issue worthy of review. At most, petitioner's constitutional claim involves no more than an application of the well-settled principles set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980) for reconciling the Confrontation Clause and the various exceptions to the hearsay rule. The exception petitioner is challenging is the so-called *Hillmon* rule [*Mutual Life In-*

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\* As indicated, counsel's objection at the first trial was based solely on hearsay grounds. Petitioner's claim now under the Confrontation Clause was never mentioned at trial. On appeal, petitioner raised the constitutional claim only in passing, and it was not discussed either by the Appellate Division or the Court of Appeals in their written decisions.

*urance Co. v. Hillmon*, 145 U.S. 285 (1892)], allowing the admission of declarations of future intent to show that an intended meeting took place, as planned.

In *Roberts* the Court held that before the hearsay testimony may be introduced, there must first be a showing that the declarant is unavailable. Once that requirement is satisfied, the statement will be admissible if it bears adequate "indicia of reliability". 448 U.S. at 66, *supra*.

Here, unavailability is conceded because the declarant was dead. As to the "indicia of reliability" requirement, the *Hillmon* rule—formulated almost 100 years ago by this Court—surely constitutes a firmly-rooted hearsay exception whose reliability may be assumed under *Roberts*. See 6 Wigmore, Evidence §1725 (Chadbourn rev. 1976). More significantly, there is no reason for this Court to review each and every exception to the hearsay rule—the very pitfall *Roberts* sought to avoid. And a review of the *Hillmon* rule is especially unwarranted because no division of authority has arisen concerning its compatibility with the Confrontation Clause.

Even if the *Hillmon* rule were not such a firmly-rooted exception, a declaration of future intent still would pass constitutional muster under the Confrontation Clause so long as "indicia of reliability" was present. Once again, given the *Roberts* decision, this Court has no call to grant certiorari to determine whether the *Roberts* "indicia of reliability" criterion was met in a particular case.

In any event, the record here demonstrates that the statements of future intent concerning petitioner's meeting

with Jimmy Terrell were surrounded by "indicia of reliability". Jimmy had been meeting with petitioner on a regular basis in the preceding months. Several of those meetings had taken place at the precise location (a Pathmark store) mentioned by Jimmy for the upcoming meeting. Jimmy's reference to the purpose of the meeting—to make a large-scale drug transaction—was confirmed by Harry Terrell when he saw that Jimmy was carrying bags full of money to the meeting.

There also was overwhelming evidence showing that the meeting took place exactly as it had been planned. Harry Terrell recognized petitioner's rented blue Ford, parked in the usual spot, when he and Jimmy Terrell arrived at the appointed hour. After Jimmy got out of his car and spoke to the occupants of the Ford, he returned to Harry and directed him to go back for more money—undoubtedly to be used in another drug transaction with petitioner. Harry retrieved the second bag and gave it to Jimmy. And when Jimmy entered the Ford with the second bag, the first burst of shots rang out and the Ford drove toward Harry's parked car. As the Ford slowly passed by, Harry saw petitioner, whom he recognized immediately from their prior encounters, seated in the back seat, aiming a gun.

Given all the confirming facts, the reliability of the statements becomes manifest. These facts also demonstrate that, as found by the Appellate Division, the evidentiary error, if any, was harmless. Surely certiorari review is unnecessary to decide whether a particular hearsay statement was reliable or whether the error was harmful.

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In sum, the finding of non-preservation by the New York Court of Appeals constitutes an independent and adequate state ground which bars review of petitioner's claim. In addition, given this Court's recent enunciation in *Roberts* of the general principles governing the Confrontation Clause and hearsay exceptions, no purpose would be served by reviewing the particular exception and facts involved here.

### Conclusion

***The petition for a writ of certiorari to the New York Court of Appeals should be denied.***

Respectfully submitted,

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